Low Tung Kwai v Perwira Affin Bank Bhd

HIGH COURT (MELAKA) — BANKRUPTCY NO 29–176 OF 1998
KN SEGARA J
21 JANUARY 2000

Bankruptcy *— Notice — Setting aside — Grounds to set aside not stated in summons-in-chambers — Whether affidavit alone shall operate as application to set aside bankruptcy notice — Rules of the High Court 1980 O 32 r 1 — Bankruptcy Rules 1969 r 95*

Civil Procedure *— Solicitor — Change of solicitors — Judgment debtor did not indicate that he has changed his solicitors — Solicitors' firm and address endorsed at foot of summons-in-chambers — Whether filing notice of change in solicitors is necessary — Rules of the High Court 1980 — O 64 r 2*

The solicitors for the judgment creditor, Messrs Abdullah & Zainudin, filed a bankruptcy notice against the judgment debtor. On 27 November 1998, the judgment debtor's solicitors filed a summons-in-chambers ('encl 12') and an affidavit of the judgment debtor ('encl 13') to set aside the bankruptcy notice. The application to set aside the bankruptcy notice came up for hearing before the learned senior assistant registrar on 31 March 1999 and learned counsel for the judgment creditor raised several preliminary objections, inter alia: (i) that the solicitors for the judgment debtor are not on record by reason of a failure to comply with O 64 r 2 of the Rules of the High Court 1980 ('the RHC'); and (ii) in respect of the summons-in-chambers ('encl 12'), there has been non-compliance with O 32 r 1 of the RHC as it did not set out the grounds of the application. The preliminary objections were dismissed and hence the appeal.

Held, dismissing the appeal:

(1) The application to set aside the bankruptcy notice was done through solicitors who have clearly endorsed their firm's name and address at the foot of the summons-in-chambers ('encl 12') as well as in the affidavit ('encl 13'). The judgment debtor had at no time indicated to court either by letter, in person or through his counsel that he has changed his solicitors. Therefore, the filing of a notice of change in solicitors does not arise at all (see p 694E–F).

(2) In an application to set aside a bankruptcy notice, the law does not require the filing of a summons-in-chambers — the filing of an affidavit alone shall operate as an application to set aside the bankruptcy notice (r 95 of the Bankruptcy Rules 1969). In any event, there would be sufficient compliance with Form 62 (O 32 r 1 of the RHC) if the summons stated the grounds by reference to an affidavit in support of the application. The summons-in-chambers filed by the judgment debtor does clearly make such a reference (see p 694H–I).

[Bahasa Malaysia summary

Peguamcara-peguamcara bagi pihak pemiutang penghakiman, Tetuan Abdullah & Zainuddin, telah memfailkan satu notis terhadap penghutang penghakiman. Pada 27 November 1998, peguamcara-peguamcara bagi pihak pemiutang penghakiman telah memfailkan satu saman-dalam-kamar ('lampiran 12') dan satu afidavit penghutang penghakiman ('lampiran 13') untuk mengetepikan notis kebangkrapan tersebut. Permohonan untuk mengetepikan notis kebangkrapan tersebut telah didengar untuk perbicaraan di hadapan penolong pendaftar kanan yang bijaksana pada 31 Mac 1999 dan peguam yang arif bagi pihak pemiutang penghakiman telah menimbulkan beberapa bantahan awalan, antara lain: (i) bahawa peguamcara-peguamcara bagi pihak penghutang penghakiman tidak terdapat di atas rekod dengan sebab satu kegagalan untuk memenuhi A 64 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) berhubung dengan saman-dalam-kamar tersebut ('lampiran 12'), terdapat ketidakpatuhan A 32 k 1 KMT kerana ia tidak menyatakan alasan-alasan permohonan tersebut. Bantahan-bantahan awalan tersebut ditolak dan oleh itu rayuan dibuat.

Diputuskan, menolak rayuan tersebut:

(1) Permohonan untuk mengetepikan notis kebangkrapan tersebut telah dilakukan melalui peguamcara-pegumcara yang dengan jelas telah mengindorskan nama dan alamat firma mereka di bahagian bawah saman-dalam-kamar tersebut ('lampiran 12') dan juga di dalam afidavit tersebut ('lampiran 13'). Penghutang penghakiman tidak pada bila-bila masa menunjukkan kepada mahkamah sama ada melalui surat, secara perseorangan atau melalui peguam beliau bahawa beliau telah menukar peguamcara-peguamcara beliau. Oleh demikian, pemfailan satu notis penukaran peguamcara tidak timbul langsung (lihat ms 694E–F).

(2) Di dalam satu permohonan untuk mengetepikan satu notis kebankrapan, undang-undang tidak menghendaki pemfailan saman-dalam-kamar — pemfailan satu afidavit sahaja akan beroperasi sebagai satu permohonan untuk mengetepikan notis kebangkrapan tersebut (k 95 Kaedah Kebangkrapan 1969). Di dalam apa keadaan, perlu wujud pematuhan yang mencukupi dengan Borang 62 (A 32 k 1 KMT) jika di dalam saman dinyatakan alasan-alasan melalui rujukan kepada satu afidavit sokongan permohonan tersebut. Saman-dalam-kamar tersebut yang difailkan oleh penghutang penghakiman telah dengan jelas membuat rujukan tersebut (lihat ms 694H–I).]

Notes

For cases on setting aside of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 1766–1785.

A For cases on change of solicitors, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 4185–4186.

Legislation referred to

B Bankruptcy Rules 1969 r 95
Rules of the High Court 1980 O 32 r 1, O 64 r 1(2)

Jyotsana Doshi (*Abdullah Zainudin*) for the judgment creditor.
J Amardas (*Thiyages Pauline Ng & Co*) for the judgment debtor.

KN Segara J: The solicitors for the judgment creditor, Messrs Abdullah &
C Zainudin, filed a bankruptcy notice against the judgment debtor, Low Tung Kwai on 30 April 1998 ('encl 2'). Then on 25 August 1998, the solicitors for the judgment creditor obtained an order for the extension of the bankruptcy notice as well as an order for substituted service on the judgment debtor ('encl 6').

D On 27 November 1998, solicitors for the judgment debtor, Messrs Thiyages, Pauline Ng & Co filed a summons-in-chambers ('encl 12') and an affidavit of the judgment debtor ('encl 13') to set aside the bankruptcy notice. The summons-in-chambers was fixed for hearing before the senior assistant registrar on 16 February 1998. Now under r 95(1) of the Bankruptcy Rules 1969, the filing of an affidavit *shall operate*
E as an application to set aside the bankruptcy notice and thereupon the registrar (senior assistant registrar) shall fix a date for the hearing of the application.

Rule 95 of the Bankruptcy Rules 1969 provides as follows:

> (1) The filing of an affidavit shall operate as an application to set aside the
F bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
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> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under
G the notice until the application has been heard and determined.

In the above circumstance, the filing of the summons-in-chambers ('encl 12') is superfluous but, perhaps a practical necessity to alert the registrar's attention to the application to set aside the bankruptcy notice — that is, the affidavit ('encl 13'). It is incumbent upon all parties concerned
H to ensure that the application to set aside the bankruptcy notice is heard and disposed off before any other proceedings are taken in the said bankruptcy file as no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

The application to set aside the bankruptcy notice came up for hearing before the learned senior assistant registrar on 31 March 1999 and learned
I counsel for the judgment creditor raised several preliminary objections. Although the preliminary objections were dismissed, the substantive application to set aside the bankruptcy notice was not determined. The

learned counsel for the judgment creditor, thereupon appealed against the decision of the learned senior assistant registrar on the preliminary objections ('encl 32'). A

The appeal against the learned senior assistant registrar's decision on the preliminary objections came up before me on 21 January 2000. I required no arguments and dismissed the appeal and directed the parties to expeditiously dispose off the application to set aside the bankruptcy notice before the senior assistant registrar. B

The preliminary objections regarding non-compliance with O 64 and O 32 of the Rules of the High Court 1980 ('the RHC'), by the judgment creditor, as set out in the notice of appeal are totally devoid of any merits.

The complaint of the counsel for the judgment creditor appears to be: C

(i) that the solicitors for the judgment debtor are not on record by reason of a failure to comply with O 64 r 2 of the RHC; and

(ii) in respect of the summons-in-chambers ('encl 12') there has been non-compliance with O 32 r 1 of the RHC, because it has not set out the grounds of the application. D

Order 64 r 1(2) RHC reads:

> Notice of a change of solicitor in Form 138 must be filed in the registry.

In this bankruptcy proceedings, a perusal of the court file shows that the judgment debtor had not acted in person at any time after service of the bankruptcy notice. His very first application to court is to set aside the bankruptcy notice. This application to set aside the bankruptcy notice was done through solicitors who have clearly endorsed their firm's name and address at the foot of the summons-in-chambers ('encl 12') as well as in the affidavit ('encl 13'). The judgment debtor has at no time indicated to court either by letter, in person or through his *counsel* that he has changed his solicitors. Therefore, the filing of a notice of change in solicitors does not arise, *at all.* E F

Order 32 r 1 RHC reads:

> Except as provided by O 25 r 7, every application in Chambers must be made by summons in Form 62. G

I am made to understand, from the grounds of judgment of the learned senior assistant registrar, that the preliminary objection with reference to this rule was that the summons-in-chambers herein ('encl 12') had failed to observe Form 62 because it had not set out the grounds of the application. This again, is a frivolous preliminary objection. In an application to set aside a *bankruptcy notice* the law does not require the filing of a summons-in-chambers — the filing of an affidavit alone *shall operate* as an application to set aside the bankruptcy notice (r 95, Bankruptcy Rules 1969). In any event, there would be sufficient compliance with Form 62 if the summons stated the grounds by reference to an affidavit in support of the application. The summons-in-chambers, herein, does clearly make such a reference. H I

A Non-compliance with a form is a mere irregularity and shall not nullify the proceedings — O 2 r 1 RHC.

Appeal dismissed. Senior assistant registrar to hear and determine the application to set aside the bankruptcy notice.

Appeal dismissed.

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Reported by Benjamin Yong

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